BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARILYN J. DIPASQUALE	)	
Claimant	)	
V.	)	
	)	Docket Nos. 1,041,858
	)	1,059,321
U.S.D. 475	)	
Respondent	)	
AND	)	
	)	
KANSAS ASSOCIATION OF SCHOOL BOARDS	)	
WORKERS COMPENSATION FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the February 6, 2015, Award by Special Administrative Law Judge (SALJ) Jerry Shelor. The Board heard oral argument on July 7, 2015.

APPEARANCES

Jeffrey K. Cooper, of Topeka, Kansas, appeared for the claimant. Anton C. Andersen, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The SALJ placed greater weight on the opinions of Dr. Pratt and Dr. Koprivica and, in considering old law and new law, found claimant's back injury to be an aggravation or natural progression of consequences due to claimant's development of an altered gait from the right knee injury. Claimant was awarded a 25 percent whole body functional impairment for her August 1, 2008, right knee and low back injuries, (Docket No. 1,041,858) and a 12 percent whole body functional impairment for her November 16, 2011, right knee and low back injuries. (Docket No. 1,059,321). The SALJ determined claimant was entitled to an award for the November 16, 2011, accident because the knee and low

back injuries were different from the August 21, 2008, injuries, and the November 16, 2011, accident was the prevailing factor for the second injuries.

Respondent appeals, arguing claimant failed to prove by credible medical evidence she sustained a low back injury arising out of and in the course of her employment on August 21, 2008. Therefore, the claim under Docket No. 1,041,858 should be limited to a 12 percent functional impairment to the right lower extremity at the knee, based on the opinion of Dr. Clymer. Respondent further argues that claimant's complaints under Docket No. 1,059,321 arose from an injury she sustained at home on November 11, 2011, and not from an alleged work event on November 16, 2011. Respondent contends the SALJ's Award in Docket No. 1,059,321 should be reversed or at the least limited to a 5 percent scheduled impairment to the right lower extremity at the knee.

Claimant contends the Awards in Docket Nos. 1,041,858 and 1,059,321 should be affirmed.

The issues on appeal are:

Docket No. 1,041,858

1. What is the nature and extent of claimant's disability?

Docket No. 1,059,321

1. Was the injury on November 16, 2011, a personal injury by accident that arose out of and in the course of claimant's employment?

2. What is the nature and extent of claimant's disability?

3. Was claimant's injury on November 16, 2011, the prevailing factor in causing the injury, medical condition, need for treatment and resulting disability?

4. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant worked for respondent as an instructional technologist. Her job involved working with teachers and students to integrate technology into the classroom curriculum.

In September 2004, claimant suffered a work-related injury to her left knee, which she settled on an agreed running award in October 2008.

On August 21, 2008, claimant suffered an injury to her right knee when claimant started to sit in her office chair and her chair flipped. Claimant was thrown to the floor and all of her weight went on her right knee. Claimant's right kneecap fractured in three places. Claimant testified she was consciously trying not to reinjure her left knee. Claimant remained on the floor after the accident until her co-workers, who heard her fall, came to help her. Claimant was provided workers compensation paperwork and was taken to the hospital for x-rays. It was determined claimant needed surgery. However, respondent's workers compensation carrier denied the claim, including surgery, because there was nothing wrong with her chair. Claimant sought legal counsel and surgery and physical therapy were allowed.

Claimant had surgery on her right knee on August 28, 2008, seven days after the accident, with Dr. Hinkin, the same physician who originally treated her left knee. Claimant underwent a second surgery on March 6, 2009, to remove the hardware put in her knee in August 2008. Claimant was released from Dr. Hinkin's care in April 2009.

Claimant testified she developed an altered gait and, when she walked, she did so on the left side of both feet. Going down stairs she had to hang on to something because she had a tight feeling around her right kneecap. Claimant testified she felt lopsided when she walked.

Claimant testified she was on her feet a lot and spent a portion of time going between buildings. She had pain when required to stand for long periods of time. Claimant indicated that by the end of December 2008 through the second week of January 2009, her pain got very intense and she had to sit to relieve the pain. She was not able to squat or kneel.

Claimant started experiencing cramping in her back and, by July 2009, started experiencing excessive pain. She testified the pain started in her knee and went down the lower part of her left leg and intensified into her hip and back. She had an MRI and was given pain medication and a series of cortisone injections. Claimant denied prior back problems. She related her back problems to favoring her right leg when she walked. Claimant sought treatment for her back on her own. Claimant believes her back problems are related to the August 21, 2008, injury.

Claimant testified she had back pain from the beginning, but did not say anything, hoping it would get better. When the pain did not get better, her husband encouraged her to see a doctor because something was wrong.

Claimant met with Terrence Pratt, M.D., for a court-ordered independent medical examination (IME) on April 16, 2010. Claimant's chief complaint was of discomfort involving her right knee and low back pain radiating to the distal gluteal region. She had

generalized involvement of the right thigh and leg and right knee weakness. Her symptoms were exacerbated with prolonged walking and palliated with sitting and resting.

Dr. Pratt examined claimant and diagnosed a history of right knee contusion with patellar fracture, status post open reduction and internal fixation; low back pain with degenerative disc disease, reported spondylolisthesis, and spinal stenosis. An MRI from December 30, 2009, displayed marked spinal stenosis at L3-4, moderate at L2-3 and L4-5 with disc space narrowing, bulging facet hypertrophy and ligamentous flavum thickening. There was a small annular tear at L2-3. He opined the right knee involvement is in direct relationship to the August 2008 accident. He noted the development of the lower extremity radicular type symptoms was not recorded until claimant was found to be at maximum medical improvement (MMI) and released.

Dr. Pratt found no significant evidence of an altered gait within the records available to him until after claimant reported the radicular type symptoms. He did not believe the changes identified on the MRI were directly related to the August 2008 accident. Dr. Pratt opined claimant suffered a right knee injury, but not an injury to her lumbosacral region initially. He noted that she did have spinal symptoms in 2008 and it is probable she had some aggravation of her lumbosacral involvement in relationship to the 2008 event with resultant knee procedures. However, Dr. Pratt indicated claimant's right knee involvement is not the prevailing factor in her lumbosacral involvement.[1] Rather, it is the significant structural changes identified on the studies. While it is probable that she had an aggravation of her lumbosacral involvement sometime after being released from medical care in 2009, the most significant factor in her low back condition is the preexisting involvement of the region.

Claimant met with Glenn M. Amundson, M.D., on June 9, 2010, for evaluation of her back. She complained of low back and right leg pain. The pain radiated from the low back into both buttocks, into her hips and down the lateral thigh into her anterior thigh and also down her lateral and anterior shins. She also had some numbness and tingling in the left lateral ankle on the top of her foot. Claimant reported noticing an increase in her leg pain and low back pain in July 2009. Dr. Amundson opined claimant had moderate to severe spinal stenosis at L3-4 and recommended a new and better quality MRI. He did not attribute the stenosis to the August 2008 accident.

On June 30, 2010, Dr. Amundson met with claimant, again finding moderate to severe spinal stenosis at L3-4, a very small low-grade slip at L3-4 that is not particularly mobile and borderline spinal stenosis at L2-3, L4-5 and L5-S1. Claimant chose on-the-job work hardening for her course of treatment.

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[1] The Board acknowledges the "prevailing factor" standard went into effect on May 15, 2011, and is not relevant to an August 21, 2008 accident.

Claimant was seen again on August 13, 2010. Her pain level was a 5 out of 10 and she had been doing well until a week before the visit, when her symptoms increased and she felt burning pain consistent with her spinal stenosis. She was given a Medrol Dosepak. When claimant returned on September 10, 2010, her pain level was 6 out of 10. She reported doing a lot of activities at work. She was found to be at MMI.

On September 21, 2010, Dr. Amundson opined he found no indication that the initial injury on August 21, 2008, initiated claimant's low back condition, and no records documenting concomitant complaints of low back or radicular type involvement of the lower extremities in proximity to the August 21, 2008, injury. He also noted the records do not document back spasm from December 11 to December 15, 2008. He opined claimant's brief period of gait abnormality associated with surgery did not contribute to the onset of low back symptoms in July 2009, which he attributed 100 percent to her moderate-to-severe spinal stenosis. Dr. Amundson indicated atrophy itself could result in a limp or altered gait.

At the request of her attorney, claimant met with P. Brent Koprivica, M.D., for an examination on February 21, 2011, for injuries associated with the August 21, 2008, accident. Claimant's complaints included ongoing stiffness and tightness in the right knee, pain in the right knee when going up and down stairs, inability to crawl, kneel, or squat, persistent back pain and intermittent numbness and tingling in both legs. Claimant reported intermittently dragging her legs, the right more than the left. She avoided lifting and carrying and climbing ladders.

During his physical examination of claimant, Dr. Koprivica noticed she had a slight limp on the right with toe and heel ambulation and was unable to squat due to pain in the right knee and low back. He noted that limp was most noticeable when first arising from a seated position. However, Dr. Koprivica found no mention of an altered gait in the medical records until November 2009.

Based on his observations, Dr. Koprivica opined as a direct and proximate result of the August 21, 2008, work injury, claimant suffered a severe patellar fracture that resulted in ongoing right knee pain, weakness in the right lower extremity with objective atrophy along with weakness of the right knee extensor strength on the right. The doctor noted claimant still had weakness and an altered gait as a direct and natural consequence of the August 21, 2008, injury. He also noted claimant had significant multi-level degenerative changes with spinal stenosis that pre-dated the August 21, 2008, injury. The most significant stenosis was at L3-4. Claimant was not hindered by her low back stenosis before the injury. He testified claimant reported her back problems began in March 2009

after the hardware in her knee was removed and she started limping. However, Dr. Koprivica found no mention of low back complaints until November 2009.[2]

It is Dr. Koprivica's opinion that claimant's permanent injuries to the right knee with the ongoing altered gait associated with that injury represents permanent aggravation and intensification of symptoms from lumbar spinal stenosis that are ongoing. In his opinion, the aggravation, intensification or acceleration made claimant's back condition worse. Claimant was found to be at maximum medical improvement for the lumbar pathology and the right knee.

Dr. Koprivica opined the development of impairment in the low back from the aggravation and intensification of the preexistent spinal stenosis arose as a direct and natural consequence of the permanent injury to the right knee on August 21, 2008. Dr. Koprivica determined the 2008 accident aggravated claimant's spinal stenosis. But he acknowledged without an altered gait he could find no connection between the stenosis and the 2008 accident.

Dr. Koprivica assigned to claimant an overall impairment of 25 percent functional impairment to the whole person for the August 21, 2008, work injury. This rating included a 13 percent lower extremity impairment for the patellar fracture/muscle atrophy and resulting graded weakness of the knee, a 9 percent impairment for lumbar range of motion limitations, a 5 percent impairment for loss of true lumbar extension, 4 percent for loss of lumbar flexion, and ultimately determined and based on the preferred Injury Model of the AMA *Guides*, 4th edition, a 20 percent whole person impairment for the lumbar spine. He acknowledged preexisting stenosis which he determined was not impairing. He, thus, apportioned no part of the impairment to a preexisting condition. He then combined the knee and lumbar impairments resulting in a 24 percent whole person impairment, which he then rounded up to a 25 percent whole person impairment.

On November 16, 2011, claimant suffered a second injury to the back of her right leg around her ankle when a teacher in a motorized wheelchair accidently ran into her. Claimant returned to Dr. Hinkin for an MRI of her right leg. It is claimant's understanding that when she was hit in the back of the leg, it twisted and the pressure from the knee caused her tibia to fracture and the process of twisting caused more strain on her back. Dr. Hinkin gave claimant a knee brace, ordered physical therapy for claimant's back and sent her to a chiropractor. Claimant testified that if she is not careful her back will spasm for two or three days at a time.

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[2] The July 14, 2009, medical report of Dr. Murati failed to mention an altered gait (Koprivica Depo. at 42), nor back complaints. (R.H. Trans. at 26).

Claimant indicated her back pain is constant and back spasms occur every two or three months. She testified the spasms feel like cramping that does not stop. Claimant's lower back pain is from the August 2008 accident and her upper back pain is from the November 2011 accident. Claimant indicated she favored her gait since her right knee surgery.

Five days before the November 15, 2011, wheelchair incident, while at home, claimant's knee caught and she caught herself on the couch before she fell. She testified she was so afraid of hurting her knee again she grabbed onto whatever was handy and in doing that she had to turn her back, which was aggravated.

On December 17, 2012, Dr. Koprivica evaluated claimant for injuries associated with the November 16, 2011, accident. Claimant had complaints of increased right knee pain, and a new complaint/injury of left upper parathoracic and right lower paralumbar pain.

Dr. Koprivica examined claimant and opined claimant's November 16, 2011, work injury represents the direct, proximate and prevailing factor in claimant's new non-displaced tibial plateau fracture of the right knee in the presence of the prior mechanical dysfunction of the right knee associated with the August 21, 2008, work injury. He found claimant suffered a thoracic and lumbosacral strain/sprain from the November 16, 2011, accident. He found no evidence of thoracic radiculopathy, thoracic myelopathy or lumbar radiculopathy based on the new injury on November 11, 2011.

Claimant was found to be at MMI for the November 16, 2011, injury. He had no further treatment recommendations. Dr. Koprivica opined the prevailing factor was the August 21, 2008, injury. Claimant was maintaining employment, so no restrictions were imposed. He testified it is probable claimant will need knee replacement in the future.

On May 28, 2013, Dr. Koprivica wrote an addendum to his December 17, 2012, report in which he assigned claimant a 12 percent whole person impairment for the November 16, 2011, injury, which included a 5 percent lower extremity impairment for the tibial plateau fracture (2 percent whole person) and a 5 percent whole person impairment each for the thoracic spine and lumbar spine.

Claimant stopped working for respondent in June 2013. At the time of the regular hearing she was teaching sixth, seventh and eight grade language arts part-time (8:15 a.m. to 11:15 a.m.) at Topeka Lutheran.

Claimant met with David J. Clymer, M.D., on February 24, 2014, for an evaluation of her two work-related injuries, at respondent's request. Claimant reported ongoing discomfort and stiffness in her right knee. Claimant provided a history of back pain with radiating leg discomfort that has subsequently calmed down. Claimant has not required treatment for her low back. The medical records provided to Dr. Clymer indicated the first

complaints in the low back were recorded on November 4, 2009, by Dr. Hinkin. Her complaints at Dr. Clymer's examination were ongoing pain in the neck, upper back and right knee. Claimant indicated to Dr. Clymer she had a sense her knee might give way.

Claimant told Dr. Clymer about the November 2011 incident at her home that affected her right knee and for which she went to prompt care for x-rays and a knee brace. Dr. Clymer also indicated claimant reported this motorized wheelchair incident increased her low back complaints. Claimant had an MRI on January 10, 2012, which revealed a nondisplaced fracture involving the posterior and lateral margin of the tibial plateau. The doctor noted some aggravation of claimant's low back, according to the history provided by claimant. By the time of this evaluation, claimant's low back symptoms had diminished and did not require ongoing evaluation or treatment. Claimant did discuss ongoing neck and upper back pain as well as the pain in her right knee.

Dr. Clymer noted claimant walked with a normal gait pattern with no assistive devices. She did not mention regularly limping. Claimant had normal range of motion in her neck and upper back and good range of motion in both upper extremities. Claimant had normal contour and alignment in her low back, with mild lumbar stiffness on range of motion testing. Side to side bending was mildly self-limited. There was no point tenderness or muscle spasm.

Dr. Clymer determined the August 21, 2008, injury resulted in a patella fracture with some offset and displacement at the articular surface which was corrected surgically. He felt the surgery resulted in a healed fracture. Claimant had some post-operative knee pain and arthrofibrosis, improved by another surgery, but with ongoing knee pain, some mild offset of the joint surface and knee stiffness. Dr. Clymer assigned a 12 percent impairment to the right lower extremity for the August 21, 2008, injury.

Dr. Clymer felt the November 16, 2011, injury resulted in a knee sprain and minor nondisplaced tibial plateau fracture. He assigned a 5 percent impairment of the right lower extremity for the November 16, 2011, injury. He found no impairment for the low back or upper back as a result of these injuries.

He combined the two lower extremity impairments for a 16 percent impairment to the right lower extremity. He found claimant to be at MMI and assigned restrictions of no lifting over 25 pounds and no frequent or repetitive kneeling or squatting on the right knee. Dr. Clymer stated:

> . . . the medical records suggest that Ms. Dipasquale does have some other unrelated problems including degenerative spondylosis in the low back with MRI evidence of multilevel spinal stenosis. Fortunately this problem is not particularly symptomatic at this point and I believe this is a non-work-related issue . . . she has

> some upper back discomfort but no significant objective findings and there is no evidence of any work-related impairment with regard to that issue.[3]

Dr. Clymer indicated that a person with a fractured patella could have an altered gait if they were to use a brace. Dr. Clymer does not believe that significant back changes are caused by an altered gait, but does believe an altered gait could cause subjective discomfort in the low back. He noted claimant had no low back symptoms or complaints before the injuries to her knee, and that they progressed subsequent to the problems with her knees.

PRINCIPLES OF LAW AND ANALYSIS

Docket No. 1,041,858

K.S.A. 2008 Supp. 44-501(a) states:

> (a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.[4]

K.S.A. 2008 Supp. 44-508(g) states:

> (g) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

It is not disputed that claimant suffered a right knee injury on August 21, 2008. Every doctor who examined claimant determined the injury led to some permanent impairment of function. However, not every doctor found a connection between the right knee accident and claimant's low back complaints. Dr. Murati's records fail to note low

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[3] Clymer Depo., Ex. 2 at 4 (Dr. Clymer's February 24, 2014, report).

[4] See also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

back complaints at the July 14, 2009 exam.[5] Dr. Pratt ultimately determined the low back pain stemmed from the degenerative findings in claimant's low back. He opined some aggravation of the low back symptoms probably occurred sometime after being released from medical care in 2009.

Dr. Amundson determined claimant's brief period of altered gait had no bearing on claimant's low back pain. Instead he determined claimant's pain was the result of her moderate-to-severe spinal stenosis. Dr. Clymer noted claimant's low back and upper back complaints, but found no connection between the lower extremity injuries and claimant's back problems, identifying the same as non-work-related issues. Dr. Koprivica found a connection between the right knee injury in 2008 and the low back complaints. But he acknowledged that without an altered gait, he could find no connection between the 2008 right knee injury and claimant's spinal stenosis.

The Board finds claimant failed to prove she suffered injury to her low back as the result of the August 21, 2008, right knee accident. Claimant's award from that accident is limited to the right knee.

K.S.A. 44-510e defines functional impairment as:

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[6]

The Board finds the opinion of Dr. Koprivica that claimant suffered a 13 percent functional impairment to the right leg and the opinion of Dr. Clymer that claimant suffered a 12 percent functional to the leg, are equally persuasive. In giving equal weight to both opinions, the Board finds claimant has suffered a 12.5 percent functional impairment to the leg from the August 21, 2008, accident suffered while working for respondent. The Award of the SALJ is modified accordingly.

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[5] While medical records admitted at the preliminary hearing are not normally considered, in this instance, both claimant and respondent's submission letters to the ALJ include all preliminary hearing exhibits as part of the record. In addition, there was no objection raised at the regular hearing regarding the preliminary hearing exhibits and claimant was asked specific questions regarding the July 14, 2009, medical report of Dr. Murati, (R.H. Trans. at 26) as was Dr. Koprivica (Koprivica Depo. at 42) and Dr. Clymer (Clymer Depo. at 11).

[6] K.S.A. 2008 Supp. 44-510e(a).

Docket No. 1,059,321

K.S.A. 2011 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(g) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(g) states

> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant alleges a second right lower extremity injury on November 16, 2011, while working for respondent. Claimant alleges she suffered additional injuries to her right knee and new injuries to her upper back. This accident, however, is disputed by respondent due to claimant having suffered an accident at home five days before, when claimant's knee gave out and she fell onto a couch. Respondent contends the earlier incident at home caused claimant's new symptoms to both her knee and back. However, claimant described the incident at home as involving a near fall where she caught herself on a couch. Claimant missed no work after this incident and, claimant testified, the pain after the November 16, 2011, injury at work was more significant. Finally, Dr. Koprivica testified that the force generated by the near fall onto the couch would not generate enough force to cause the fracture claimant was diagnosed with after the incident at work with the motorized wheel chair. The Board notes claimant was able to return to work without apparent limitation between the incidents. It was after the work injury on November 16, 2011, that claimant required medical treatment. The Board finds the incident at claimant's home on November 11, 2011, was of little significance. The prevailing factor in claimant's need for ongoing medical treatment and the resulting impairment was the work-related accident on November 16, 2011.

K.S.A. 2011 Supp. 44-510d(a)(b)(16) states:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i, and amendments thereto. The injured employee may be entitled to payment of temporary total disability as defined in K.S.A. 44-510c, and amendments thereto, or temporary partial disability as defined in subsection (a)(1) of K.S.A. 44-510e, and amendments thereto, provided that the injured employee shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total or temporary partial disability as provided in the following schedule, 66⅔% of the average weekly wages to be computed as provided in K.S.A. 44-511, and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c, and amendments thereto.

> (b) If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
> . . .
> (16) For the loss of a leg, 200 weeks.

Claimant alleged injuries to both her knee and upper back from the November 16, 2011 accident. Respondent further disputes claimant's allegations of back injuries from this accident, contending, if the Board does award benefits from this accident, the award should be limited to a scheduled injury to the leg only. The only health care providers to evaluate claimant after the 2011 accident were Dr. Clymer and Dr. Koprivica. Dr. Clymer found claimant's injuries were limited to the lower extremity only. Dr. Koprivica determined claimant suffered both lower extremity injuries and lumbar and thoracic back injuries from the 2011 accident. The Board notes, while Dr. Koprivica awarded claimant a 5 percent whole person functional impairment to both the lumbar and thoracic spines, claimant testified to permanent pain from the second accident in the upper back only. The Board finds claimant has satisfied her burden of proving injuries to both the right lower extremity at the level of the knee and to her thoracic spine as the result of the November 16, 2011 accident.

K.S.A. 2011 Supp. 44-510e(a)(2)(B)(C)(i) states:

> (B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.
> (C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
> (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

Both Dr. Clymer and Dr. Koprivica assigned claimant a 5 percent functional impairment to the right lower extremity at the level of the knee, which converts to a 2 percent whole person impairment, pursuant to the AMA *Guides*. Additionally, Dr. Koprivica assigned claimant a 5 percent functional whole person impairment for injuries suffered to her thoracic spine. These impairments combine for a 7 percent whole person functional impairment. The Award of the SALJ is modified accordingly.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the SALJ should be modified in Docket No. 1,041,858, to award claimant a 12.5 percent functional impairment to her right leg at the level of the knee. In Docket No. 1,059,321, the Award of the SALJ is modified to award claimant a 7 percent whole person functional impairment for injuries suffered to claimant's right leg at the level of the knee and to claimant's thoracic spine. In all other regards, the Award of the SALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

AWARD

Docket No. 1,041,858

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated February 6, 2015, is modified to award claimant a 12.5 percent functional impairment to the right leg at the level of the knee, against respondent and the insurance carrier, for an accident sustained on August 21, 2008.

Claimant is entitled to .14 weeks of temporary total disability compensation at the rate of $529.00 per week or $74.06, followed by 24.98 weeks of permanent partial disability at the rate of $529.00 per week totaling $13,214.42 for a total award of $13,288.48, all of which is due and owing and ordered paid in one lump sum, minus amounts previously paid.

Docket No. 1,059,321

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor, dated February 6, 2015, is modified to award claimant a 7 percent whole person functional disability, against respondent and the insurance carrier, for an accident on November 16, 2011.

Claimant is entitled to 29.05 weeks of permanent partial general disability at the weekly rate of $555.00 totaling $16,122.75, all of which is due and owing and ordered paid in one lump sum, minus amounts previously paid.

In all other regards, the Award of the SALJ is affirmed in so far as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this _____ day of August, 2015.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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